Supreme Court, U.S.
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No. _____ 08-419

In The
Supreme Court of the United States

JOHN KENNETH COIL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the District Court err in overruling Mr. Coil's objections to the application of the United States Sentencing Guidelines, in that the Court believed that it was required to apply upward adjustments to Mr. Coil's offense conduct, without benefit of a jury finding regarding the facts alleged in support of those adjustments.

2. Did the Court of Appeals err in refusing to address Mr. Coil's arguments regarding the District Court's criminal history calculations on the ground that Mr. Coil had abandoned this issue?

3. Did the District Court err in imposing a sentence of 60 months that was unreasonable because Defendant failed to receive any benefit for acceptance of responsibility under U.S.S.G. §3E1.1 as contemplated by the sentencing guidelines.

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United States v. Coil, 2008 WL 2325654 (5th Cir., 2008)

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit sought to be reviewed was entered on June 3, 2008. (App. 1-7) A petition for rehearing was denied on July 1, 2008. (App. 21) There was no motion for extension of time to file petition for certiorari filed. The judgment of the Fifth Circuit is reviewable on certiorari under 28 U.S.C. §1254(1). Notification pursuant to Supreme Court Rule 29.4(b) is not required, as the United States is a party to this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor

shall private property be taken for public use without just compensation.

United States Constitution, Amendment 5.

STATEMENT OF THE CASE

This is an appeal from a criminal case in which the Petitioner, John Kenneth Coil, was charged along with several family members and others in a thirty-two count superseding indictment with RICO (18 U.S.C. §1962), RICO conspiracy (18 U.S.C. §1962(d)), Klein conspiracy (18 U.S.C. §371), false statements (18 U.S.C. §1001), mail fraud (18 U.S.C. §1341), importation of obscene materials (18 U.S.C. §1462), interstate transportation of obscene materials (18 U.S.C. §1465), engaging in the business of selling or transporting obscene materials (18 U.S.C. §1466), income tax evasion (26 U.S.C. §7201), and false representation of social security number (42 U.S.C. §408). *1 R. 127-195.*

The case was initially filed in the Western District of Texas, Waco division, the Honorable Walter Smith presiding. Judge Smith *sua sponte* reassigned the case to the docket of the Honorable Harry Lee Hudspeth. *1 R. 74.*

Petitioner entered into a plea agreement with the Government, in which he agreed to plead guilty to one count of tax evasion and one count of transportation of obscenity in interstate commerce, and not to

contest forfeiture of certain assets, in exchange for the Government moving to dismiss all other counts of the indictment. *5 R. 1037-1043.*

The Court ordered a presentence report (PSI), and Mr. Coil raised various objections to the presentence report, specifically raising objections to the upward adjustments recommended in the PSI under *Blakely v. Washington*, 124 S.Ct. 2531, 2004 U.S. Lexis 4573 (2004). *11 R. 2-16.* The Court overruled each of Mr. Coil's objections and sentenced Mr. Coil to 60 month's imprisonment on count 9, though the PSI stated that the low end of the guidelines after all adjustments was 63 months. The Court explained that it was doing so because the statutory maximum for that offense was 60 months. *11 R. 27.* The Court sentenced Mr. Coil to 63 months imprisonment on count 23, the mail fraud count, which the PSI stated was the low end of the guidelines after all upward adjustments. The statutory maximum for that offense was also 60 months.

Petitioner timely filed notice of appeal from the conviction and sentence, *6 R. 1179.* The Fifth Circuit heard the appeal and vacated the sentence, both on the ground that the sentence exceeded the statutory maximum prescribed for the offense, and for error under *United States v. Booker,* 543 U.S. 220 (2005). *United States v. Coil,* 442 F.3d 912 (5th Cir. 2006). The case was remanded back to the District Court for resentencing.

At the resentencing, on March 27, 2007. (App. 22-41) Petitioner was sentenced to 60 months imprisonment, the statutory maximum for both offenses of conviction, to run concurrently. (App. 38-39) Mr. Coil timely filed notice of appeal, *8 R. 1810,* and the conviction was affirmed on June 3, 2008. (App. 1-7) A petition for rehearing was denied by the Fifth Circuit on July 1, 2008. (App. 21)

STATEMENT OF FACTS

John Kenneth Coil was charged along with several family members and others in a thirty-two count superseding indictment. Petitioner entered a plea agreement with the AUSA, in which he agreed to plead guilty to counts 9 (interstate transportation of obscenity) and 23 (income tax evasion) of the superseding indictment, and to waive contest of forfeiture of certain real properties, in exchange for the Government moving to dismiss the other counts of the indictment. *5 R. 1037-1043.* The Petitioner entered his plea of guilty to those two counts on June 11, 2004. The Government dismissed the remaining counts of the indictment at sentencing. *11 R. 30.*

The PSI set Mr. Coil's guideline range at 63-78 months. The PSI stated that the base offense level for the tax evasion was six. *PSI ¶ 77.* Thirteen points were added based on the amount of loss. *PSI ¶ 78.* (Petitioner stipulated to the amount of loss in the factual basis, and therefore did not object to this

adjustment). Two points were added for more than minimal planning, and two points for sophisticated means. *PSI ¶ 79, 80.* Four points were added for leader/organizer role in the offense. *PSI ¶ 82.* The adjusted offense level recommended by the PSI was thus 27 for this count. *PSI ¶ 84.*

On the obscenity count, the PSI set the base offense level at 10. *PSI ¶ 70.* Five points were added because the distribution was for pecuniary gain. *PSI ¶ 71.* Four points were added because the obscene material displayed masochistic behavior. *PSI ¶ 72,* and four points were added for leader/organizer role in the offense, *PSI ¶ 74,* for an adjusted offense level of 23 for this offense. *PSI ¶ 76.* The offenses were grouped pursuant to U.S.S.G. §3D1.2(b). *PSI ¶ 69.* Two points were subtracted for acceptance of responsibility, *PSI ¶ 86,* for a total offense level of 25, criminal history category II. *PSI ¶¶ 88, 94.*

Mr. Coil raised various objections to most of the upward adjustments made in the PSI, specifically arguing that the United States Supreme Court's decision in *Blakely v. Washington,* 124 S.Ct. 2531 (2004), precluded the constitutional application of such adjustments based on unadjudicated facts without a jury finding. *See Defendant's objections to PSI.* Specifically, Mr. Coil objected to the upward adjustment for role in the offense, the use of relevant conduct in sentencing, the adjustment for masochistic behavior, the adjustment for more than minimal planning, and the adjustment for use of sophisticated

means, all as being in violation of this Court's holding in *Blakely*.

The defense also objected that the advisory use of the United States Sentencing Guidelines, arguing that the practice of making upward adjustments based on findings of fact that are neither stipulated to nor found by a jury to have been proved beyond a reasonable doubt is unconstitutional.

Regarding the criminal history calculation, Mr. Coil was sentenced to a fine of $1,000.00 for a forgery case in October 9, 1974. *PSI ¶ 90*. He was also sentenced to three days in jail and a $1,000.00 fine in a Sale of Obscene Material case on December 10, 1976. *PSI ¶ 91*. Mr. Coil was convicted in this case of count 9, transportation of obscene material in interstate commerce, alleged to have occurred between on or about April 25, 2000 and July 10, 2003, *Indictment, 1 R. at 158*; and on count 23, mail fraud, alleged to have occurred on or about October 18, 2000, *Indictment, 1 R. at 175*

The PSI assessed one criminal history point for each of the prior convictions, and the District Court agreed, over the Petitioner's objection that the prior sentences were for less than one year and one month, and imposed more than ten years before the commencement of the offenses of conviction, and thus should not be counted under U.S.S.G. §4A1.2(e).

At the first sentencing hearing the District Court overruled each of Mr. Coil's objections and sentenced Mr. Coil to 60 months imprisonment on count 9. The

District Court sentenced Mr. Coil to 63 months imprisonment on count 23, the mail fraud count, which the PSI stated was the low end of the guidelines after all upward adjustments. The Fifth Circuit reversed and remanded the case for resentencing in *United States v. Coil*, 442 F.3d 912 (5th Cir. 2006), *cert. denied*.

Prior to the resentencing a virtually identical PSI was prepared and Petitioner filed written objections. At the resentencing on March 27, 2007, the District Court overruled all of Petitioner's objections except the objection to Paragraph 75, regarding the adjustment for material which depicts or displays masochistic behavior. (App. 35-38) The District Court did not make any detailed finding with regard to Petitioner's objections. *Id.* The Court did not determine under *Booker* whether the guidelines calculations were proper under the charges Petitioner pled guilty. *Id.* Mr. Coil was sentenced to 33 months as to count 9, and 60 months as to count 23, to be served concurrently. (App. 38-39)

On June 3, 2008, the Fifth Circuit affirmed the sentence, rejecting Petitioner's challenges to the sentence. (App. 1-7) The Fifth Circuit held that Coil failed to raise challenges to his criminal history calculation in the prior appeal and therefore this argument had been waived. (App. 3-4) The Fifth Circuit also determined under a plain error standard the district court reasonably adopted the presentence report's recommended enhancements and the court considered "all the factors for a fair sentence" in

depriving him credit for acceptance of responsibility. (App. 6-7)

REASONS FOR GRANTING THE PETITION

1. The District Court erred in overruling Mr. Coil's objections to the application of the United States Sentencing Guidelines, in that the Court believed that it was required to apply upward adjustments to Mr. Coil's offense conduct, without benefit of a jury finding regarding the facts alleged in support of those adjustments, and the Court relied on the remedial opinion of *United States v. Booker*, to find that the Sentencing Guidelines are advisory, rather than mandatory.

The United States Supreme Court held in *United States v. Booker*, 543 U.S. 220 (2005), that the sentencing court may not apply upward adjustments under the United States Sentencing Guidelines that are neither included in the indictment, nor found by a jury, nor stipulated to by the parties. Had the Court sentenced Mr. Coil under the sentencing guidelines, without the application of the upward adjustments, his guidelines range would have been 17, for a sentence of 27-33 months.

To the extent that the remedial opinion of *Booker* permits application of the United States Sentencing Guidelines in an advisory fashion, that opinion was wrongly decided and should be overruled,

in that it violates the separation of powers doctrine of the United States Constitution. The United States Supreme Court has never, prior to *Booker*, presumed to have the power to strike any statute properly enacted by the legislative branch, unless that statute was unconstitutional. This was nevertheless what the Court did in the remedial opinion of *Booker,* holding that 18 U.S.C. §§3553(b)(1) and 3742(e) were void, even though no one – not even the Supreme Court – contended that those sections were unconstitutional.

The statutes making application of the guidelines mandatory are constitutional, as are the guidelines themselves. What is unconstitutional is the application of the guidelines in a manner which permits the sentencing court to base its sentence on facts which are neither proved to a jury beyond a reasonable doubt nor admitted to by the defendant,. *Apprendi v. New Jersey,* 530 U.S. 466 (2000); *Blakely v. Washington,* 542 U.S. 296 (2004). In other words, U.S.S.G. §1B1.3, which requires the sentencing Court to take into account "relevant conduct," is perfectly constitutional, so long as it is not applied in a way that allows the Court to take into account relevant conduct that was neither pleaded nor proved.

Here, the District Court found that the Guidelines were advisory rather than mandatory, and applied the Guidelines in a way inconsistent with *Blakely.* The Fifth Circuit acknowledged this argument in its opinion but determined that it was bound by *Booker.* (App. 2-3)

2. The Court of Appeals erred in refusing to address Mr. Coil's arguments regarding the District Court's criminal history calculations on the ground that Mr. Coil had abandoned this issue.

At his original sentencing and again at his re-sentencing, the District Court incorrectly calculated Mr. Coil's criminal history by taking into account two sentences of imprisonment of less than one year, both of which were imposed more than ten years before the commencement of the instant offense. The Fifth Circuit refused to address Mr. Coil's arguments regarding the criminal history category, holding that the issue had been abandoned by Mr. Coil when he failed to raise it in his first appeal.

U.S.S.G. §4A1.2(e)(1) provides:

> Any prior sentence exceeding one year and one month that was imposed within fifteen years of the defendant's commencement of the instant offense is counted. Also count any prior sentence of imprisonment exceeding one year and one month, whenever imposed, that resulted in the defendant being incarcerated during any part of such fifteen year period.

Obviously, this section does not apply to either of the prior offenses complained of, because neither was a sentence of imprisonment exceeding one year and one month.

U.S.S.G. §4A1.2(e)(2) provides:

> Any other prior sentence that was imposed within ten years of the defendant's commencement of the instant offense is counted.

Again, this section does not apply because neither of the sentences complained of was imposed within ten years of the Defendant's commencement of the offenses of conviction. Count 9 was alleged to have been committed between on or about April 25, 2000 and July 10, 2003, more than 24 years after the latter of the sentences complained of was imposed. Count 23 was alleged to have been committed on or about October 18, 2000, more than 23 years after the latter of the sentences complained of was imposed.

U.S.S.G. §4A1.2(e)(3) provides:

> Any prior sentence not within the time periods specified above is not counted.

Clearly, the sentences in the two cases complained of fall into this latter category.

The Fifth Circuit recently held in *United States v. Arviso-Mata,* 442 F.3d 382 (5th Cir. 2006) – in circumstances identical to this case except that the convictions in *Arviso-Mata* were much more recent than the ones in this case – that the consideration of an outdated conviction under §4A1.2(e) is plain error. In this case, the Court need not determine whether it is plain error, because defendant specifically objected to this application of the guidelines both in his objections to the PSI and orally at the sentencing hearing.

The Fifth Circuit refused to address the merits of this contention, holding: "Issues not raised in an appeal prior to this court's last order of remand are deemed abandoned. Coil's challenge to the calculation of his criminal history score was not raised in his appeal prior to this Court's last order of remand and is deemed abandoned." (App. 3, *citations omitted.*)

In order to understand that Mr. Coil did not abandon this claim, it is necessary to look closely at the timing of Mr. Coil's first sentencing and appeal, relative to the issuance of this Court's opinions in *Blakely* and *Booker*. Mr. Coil was originally sentenced in this case on June 11, 2004. At that hearing, Mr. Coil objected to the imposition of sentence based on the unconstitutional application of the sentencing guidelines, to wit: the use of unadjudicated conduct to enhance his sentence. *United States v. Coil,* 442 F.3d 912 (5th Cir. 2006). A few days later, on June 24, 2004, this Court issued its opinion in *Blakely v. Washington,* 542 U.S. 296 (2004). Mr. Coil appealed his sentence, and filed his brief *after* this Court's opinion in *Blakely* had already issued. It was so clear from the *Blakely* opinion that this Court would hold the application of the United States Sentencing Guidelines to be unconstitutional, just as it had done with the application of the Washington sentencing guidelines in *Blakely,* that Mr. Coil and his attorneys had little doubt that the sentence would be reversed. In the interest of judicial economy, therefore, Mr. Coil's original brief to the Fifth Circuit concentrated on appellate points relating to pre-sentencing issues,

and restricted the sentencing arguments to the *Blakely* issue. This approach was in fact vindicated when the Fifth Circuit issued its opinion some two years later, reversing Mr. Coil's case based on this Court's intervening opinions in *Blakely* and *United States v. Booker*, 543 U.S. 220 (2005).

In his second appeal, the District Court repeated its error regarding Mr. Coil's criminal history calculation, and Mr. Coil appealed this error. The Fifth Circuit, relying on its earlier opinion in *Eason v. Thaler,* 73 F.3d 1322, 1329 (5th Cir. 1996), refused to address the claim on the ground that it had been abandoned. *Eason,* however, was an appeal from a civil rights lawsuit filed by a prisoner regarding prison conditions. The suit was originally dismissed on summary judgment, and Eason appealed the dismissal of certain portions of his claim, arguing that he would have been able to overcome summary judgment had the District Court permitted him a hearing. The Fifth Circuit agreed, and remanded for a hearing on the issues raised by Eason, specifically holding that all other issues had been abandoned. *Eason v. Thaler (Eason I)*, 14 F.3d 8 (5th Cir. 1994). On remand, the District Court permitted a hearing not only on the issues appealed by Eason, but also on one issue that the Fifth Circuit had held that Eason abandoned. *Eason II,* 73 F.3d at 1329. The District Court again granted summary judgment for the defendants, and Eason appealed the grant of summary judgment on each issue, including the issue previously deemed abandoned. In the second appeal,

the Fifth Circuit quite correctly held that in a civil case that has been dismissed as to all claims, a plaintiff abandons any claims as to which he fails to appeal that dismissal. *Id.*

In this criminal case, by contrast, the Fifth Circuit incorrectly held that by failing to raise a sentencing issue that was entirely subsumed within and mooted by the over-arching *Blakely* issue, and which was later repeated at a separate sentencing, Mr. Coil had somehow abandoned that issue for all time. To demonstrate the tenuousness of this argument, let us look at an analogy. Suppose that the District Court in *Eason* had ruled not only that Eason's claims were frivolous, but that in addition, prisoners were not allowed to file civil suits against prisons. Had Eason just appealed this over-arching issue – certain of reversal on this issue standing alone – he could hardly be said to have abandoned the issues as to the individual claims, all of which were subsumed and mooted by the larger issue.

The sentence should have been vacated and this case remanded for resentencing. As such, the petition should be granted.

3. The resulting sentence of 60 months was unreasonable because Defendant failed to receive any benefit for acceptance of responsibility under U.S.S.G. §3E1.1 as contemplated by the sentencing guidelines resulting in a circuit split.

The final offense level calculation of level 25 for count 23 under the sentencing guidelines wholly failed to take into account the statutory maximum sentence for the offense imposed by Congress. As set forth in the Fifth Circuit's previous opinion in *United States v. Coil*, 442 F.3d 912, 914 (5th Cir. 2006), the statutory provision, 13 U.S.C. §1341 provided for a sentence of not more than 5 years (60 months) in this case. However, the adjusted offense level as calculated in the presentence report, paragraph 88, is a level 25 that calls for a sentence of 63-78 months, over the statutory maximum. Section 5G1.1(a), U.S.S.G., requires that the statutory maximum controls over the guidelines sentence, recognizing that the court does not have authority to impose a sentence greater than the statutory maximum. *See, United States v. Rodriguez*, 64 F.3d 638, 642 (11th Cir. 1995). As a result, the District Court imposed a sentence to 60 months, the statutory maximum on count 23.

The sentencing range for Petitioner for a total offense level of 25 *after* adjustment for acceptance of responsibility is 63-78 months, which exceeds the statutory maximum. As such, while the sentencing guidelines provide for a higher sentence than allowed

by statute, Petitioner is not given *any* benefit for acceptance of responsibility in this case. As the comment to U.S.S.G. §3E1.1 states, "[t]he reduction of offense level . . . recognizes legitimate societal interests. For several reasons, a defendant who clearly demonstrates acceptance of responsibility for his offense, . . . is appropriately given a lower offense level than a defendant who has not demonstrated acceptance of responsibility." This is particularly important in a case such as this where each level of the guidelines makes a substantial difference in the range of sentence.

As such, the adjusted offense level should be calculated with the statutory maximum sentence in mind. In order for Petitioner to receive the benefit to which he is entitled for acceptance of responsibility, the two-level credit for such acceptance should be calculated from the level that reflects that statutory maximum provided by Congress. The statutory maximum of 60 months is reflected in the mid-range of a level 23 or the low range of a level 24. Based upon these levels, in order to give Petitioner proper credit for fully accepting responsibility, the advisory guidelines level should be a level 21 or the low end of a level 22.

In *United States v. Rodriguez*, *supra*, 64 F.3d at 642, the Eleventh Circuit recognized in a pre-*Booker* decision that the statutory maximum cap on a sentence gave the sentencing court discretion to depart downward to adequately reflect acceptance of responsibility. The Court noted that the guidelines

clearly and explicitly consider acceptance of responsibility and determined that the Sentencing "Commission failed to consider that §5G1.1 could operate to negate the effect of §3E1.1 adjustment and undermine the 'legitimate societal interests' served by the adjustment." 64 F.3d, at 643.

The Eleventh Circuit stressed that had the defendant not accepted responsibility, he would have received the same sentence under the guidelines. The Eleventh Circuit stated:

> A defendant evaluating whether to plead guilty or go to trial traditionally considers how his decision will affect his sentence. If a defendant knows that, under §5G1.1(a), he will likely receive the same sentence regardless of whether he accepts responsibility, he will be more likely to shun plea bargaining and go to trial. A chance of acquittal is always present; there is less incentive to forego this chance if a guilty plea will not be rewarded with sentencing leniency. Allowing departure based on acceptance of responsibility in such circumstances preserves the possibility of some sentencing leniency and thus serves society's interest in guilty pleas and plea bargaining.

Id.

The Court concluded, "[w]e hold, therefore, that a district court has the discretion to reward a defendant's acceptance of responsibility by departing downward when §5G1.1(a) renders ineffectual §3E1.1

in reducing the defendant's actual sentence." *Id.*, at 643. This reasoning carries even greater weight in the post-*Booker* environment where the guidelines are advisory and the district court is placed in the role of "retail" sentencing as opposed to the "wholesale sentencing" under the sentencing guidelines. *Rita v. United States*, 127 S.Ct. 2456 (June 21, 2007).

In the instant case, Petitioner would have received exactly the same sentence whether or not he accepted responsibility under §5G1.1. There is no dispute that Petitioner has clearly demonstrated an acceptance of responsibility and entered into the plea agreement involving a substantial prison sentence. PSI Report, at paragraph 86. He admitted he did not pay taxes properly. PSI Report, at paragraph 68. Consequently, he should obtain the benefit authorized by the sentencing guidelines for a possibility of sentencing leniency and not be punished for the fact that the statutorily mandated sentence imposed by Congress places a cap on the sentence.

Moreover, under the reasonableness analysis required by *Booker*, the resulting sentence was unreasonable since it failed to account in any manner for the acceptance of responsibility that was reflected in the sentencing guidelines. As such, there exists a split in authority between the Eleventh Circuit in the *Rodriguez* case and the Fifth Circuit in this case and therefore the petition should be granted.

CONCLUSION

For all the above reasons and the split in authority between the circuits, Petitioner respectfully requests the Court grant this Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully Submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-50459
Summary Calendar

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

JOHN KENNETH COIL

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas
USDC No. 6:03-CR-197-1

(Filed Jun. 3, 2008)

Before KING, DAVIS, and CLEMENT, Circuit Judges.

PER CURIAM:*

John Kenneth Coil appeals the concurrent sentences imposed on remand of 33 months of imprisonment for transportation of obscene materials in

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

interstate commerce for sale or distribution and 60 months of imprisonment for tax fraud. 18 U.S.C. §§ 1341, 1465.

"We review sentences inside and outside the advisory Guidelines range for reasonableness under the abuse of discretion standard of review." *United States v. Lopez-Velasquez*, ___ F.3d ___, Nos. 07-10151, 07-10321, 2008 WL 1874577 at *1 (5th Cir. Apr. 29, 2008) (citing *Gall v. United States*, 128 S. Ct. 586, 597 (2007)). Under *Gall*, prior to reviewing a sentence under the abuse-of-discretion standard, an appellate court must first determine whether the district court committed any "significant procedural error." *Gall*, 128 S. Ct. at 597. If the sentencing decision is procedurally sound, the appellate court then considers "the substantive reasonableness of the sentence" under an abuse-of-discretion standard. *Id.* "[A] sentence within a properly calculated Guideline range is presumptively reasonable." *United States v. Alonzo*, 435 F.3d 551, 554 (5th Cir. 2006); *see also Rita v. United States*, 127 S. Ct. 2456, 2462 (2007).

Coil challenges the remedial portion of *United States v. Booker*, 543 U.S. 220 (2005), arguing that to the extent that the Supreme Court's decision made the Sentencing Guidelines advisory, *Booker* was wrongly decided and should be overruled because it violates the Separation of Powers doctrine. Coil concedes that this court cannot overrule *Booker* and acknowledges "that this Court rejected a similar (though not identical) argument in *United States v. Scroggins*, 411 F.3d 572 (5th Cir. 2005)," and he raises

the issue to preserve its further review. As Coil concedes, absent an intervening decision to the contrary by the Supreme Court, the Supreme Court's opinion *Booker* opinion is binding. *See Hopwood v. Texas,* 84 F.3d 720, 722 (5th Cir. 1996) (Politz, CJ., dissenting from denial of rehearing en banc) ("The Supreme Court has left no doubt that as a constitutionally inferior court, we are compelled to follow faithfully a directly controlling Supreme Court precedent unless and until the Supreme Court itself determines to overrule it.").

Coil argues that the district court erred in calculating his criminal history category as II because the court included two sentences of imprisonment of less than one year and imposed more than ten years before the offenses of conviction commenced, in violation of U.S.S.G. § 4A1.2(e)(2). Issues not raised in an appeal prior to this court's last order of remand are deemed abandoned. *Eason v. Thaler,* 73 F.3d 1322, 1329 (5th Cir. 1996). Coil's challenge to the calculation of his criminal history score was not raised in his appeal prior to this court's last order of remand and is deemed abandoned. *See Eason,* 73 F.3d at 1329.

Coil argues that the district court failed to make findings justifying the enhancements to his base offense level on count 23. Because Coil did not raise this argument in the district court, review of this procedural objection is for plain error only. *See Lopez-Velasquez,* 2008 WL 1874577 at *1 (relying on *United States v. Peltier,* 505 F.3d 389, 391-92 (5th Cir. 2007)

(applying plain error to unraised issue concerning the reasonableness of a sentence), *petition for cert. filed* (Jan. 22, 2008) (No. 07-8978)). On plain error review, this court "may correct the sentencing determination only if (1) there is error (and in light of *Booker,* an 'unreasonable' sentence equates to a finding of error); (2) it is plain; and (3) it affects substantial rights." *Peltier,* 505 F.3d at 392 (citation omitted). "Moreover, [FED. R. CRIM. P.] 52(b) leaves the decision to correct the forfeited error within the sound discretion of the court of appeals, and the court should not exercise that discretion unless the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* (internal quotation marks and citation omitted).

At resentencing, the district court considered Coil's objections to the Presentence Report's (PSR) recommended enhancements for a leadership role in the offense, for more than minimal planning, and for the use of sophisticated means and overruled them. In overruling the objections, the court stated that the enhancements were "traditional considerations that [had] always been applied by sentencing courts with or without guidelines before, during, and after." The court added that it was "more than appropriate to apply them to any process of arriving at a reasonable sentence in this case." The record reflects that the district court adopted the PSR. The district court may adopt the recitation of facts found in the PSR, provided that there is a sufficient basis for these facts and the defendant adduces no rebuttal evidence.

United States v. Caldwell, 448 F.3d 287, 290 (5th Cir. 2006). Coil has not met the burden of demonstrating that the district court should not have relied upon the PSR. *See United States v. Betancourt,* 422 F.3d 240, 248 (5th Cir. 2005). He has shown no error, plain or otherwise.

Coil asserts that the district court did not refer to 18 U.S.C. § 3553(a) or to any of the factors set forth in § 3553(a) in imposing sentence. This court requires arguments to be briefed in order to be preserved. *Yohey v. Collins,* 985 F.2d 224, 225 (5th Cir. 1993); FED. R. APP. P. 28(a)(9). Coil's broad statement of error without argument or citation to relevant authority is inadequate for purposes of appeal, and the issue is deemed abandoned. *See Yohey,* 985 F.2d at 225.

Finally, Coil argues that his 60-month statutory maximum sentence on count 23 was unreasonable because the sentence deprived him of any benefit for acceptance of responsibility. He notes that his guidelines range was 63 to 78 months of imprisonment or more than the 60-month statutory maximum, and he refers to U.S.S.G. § 5G1.1(a), which provides that "where the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence." Coil relies on *United States v. Rodriguez,* 64 F.3d 638 (11th Cir. 1995), a pre-*Booker* decision, arguing that the district court had the discretion to downwardly depart.

To the extent that Coil argues that the district court should have downwardly departed based on his acceptance of responsibility, a court of appeals is generally without jurisdiction to review a sentencing court's refusal to grant a downward departure when its decision is based upon a determination that a departure was not warranted on the facts of the case before it. *United States v. Hernandez,* 457 F.3d 416, 424 (5th Cir. 2006). The court retains jurisdiction to review "whether the district court's imposition of a guideline sentence instead of a non-guideline sentence was reasonable." *United States v. Nikonova,* 480 F.3d 371, 375 (5th Cir.), *cert. denied,* 128 S. Ct. 163 (2007). Because Coil did not argue in the district court that the 60-month sentence deprived him of credit for acceptance of responsibility and rendered his sentence unreasonable, review is for plain error only. *See Lopez-Velasquez,* 2008 WL 1874577 at *1; *Peltier,* 505 F.3d at 392.

Coil's sentence, within a properly calculated guidelines range, is presumptively reasonable. *See Alonzo,* 435 F.3d at 554. Because Coil's 60-month sentence was within the advisory guidelines range, this court "will give great deference to that sentence" and "will infer that the judge has considered all the factors for a fair sentence set forth in the Guidelines." *United States v. Mares,* 402 F.3d 511, 519-20 (5th Cir. 2005). Coil has not shown error, plain or otherwise with respect to his argument that his 60-month sentence was unreasonable because it failed to accord him credit for acceptance of responsibility. *See Gall,*

128 S. Ct. at 596; *see also Lopez-Velasquez,* 2008 WL 1874577 at *1; *Peltier,* 505 F.3d at 392.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-50459
Summary Calendar

D.C. Docket No. 6:03-CR-197-1

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

JOHN KENNETH COIL

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas, Waco.

Before KING, DAVIS, and CLEMENT, Circuit Judges.

JUDGMENT

(Filed Jul. 15, 2008)

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

ISSUED AS MANDATE: JUL 09 2008

UNITED STATES DISTRICT COURT
Western District of Texas

UNITED STATES OF AMERICA
v.
JOHN KENNETH COIL
Defendant.

Case Number
W:03-CR-197(1)-H
USM Number 31185-177

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

(Filed Mar. 29, 2007)

The defendant, JOHN KENNETH COIL, was represented by Mr. John Fahle, III.

On motion of the Government, the Court has dismissed the Original Indictment and Counts 1 through 8, 10 through 22, 24 through 31 of the Superseding Indictment.

The defendant pled guilty to Counts 9 and 23 of the Superseding Indictment on June 11, 2004. Accordingly, the defendant is adjudged guilty of such Counts, involving the following offenses:

Title & Section	Nature of Offense	Date of Offense	Count(s)
18 U.S.C. 1465	Transportation of Obscene Matters for Sale and Distribution	April 25, 2000 through July 10, 2003	9s
18 U.S.C. 1341	Mail Fraud	October 18, 2000	23s

As pronounced on March 27, 2007, the defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant shall notify the Court and United States Attorney of any material change in the defendant's economic circumstances.

Signed this the 29th day of March, 2007.

/s/ Harry Lee Hudspeth
HARRY LEE HUDSPETH
Senior United States
District Judge

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of THREE-THREE (33) MONTHS as to Count Nine and SIXTY (60) MONTHS as to County Twenty-Three, the sentence imposed on Count Nine is to be served concurrently with the sentence imposed on County Twenty-Three.

The Court makes the following recommendations to the Bureau of Prisons: That FMC Forth Worth be designated as the place of commitment due to defendant's medical condition.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons at or before 2:00 P.M. on Tuesday, May 29, 2007.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

_____
United States Marshal

By: _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS as to Count Nine and THREE (3) YEARS as to County Twenty-Three, and the terms of supervised release are to run concurrently.

While on supervised release, the defendant shall comply with the mandatory, standard and if applicable,

the special conditions that have been adopted by this Court as set forth on pages 4 and 5 of this judgment; and shall comply with the following additional conditions:

X The defendant shall cooperate fully with the Internal Revenue Service in ascertaining the amount of tax due and owing and in collecting any deficiency which may be determined by the Service.

CONDITIONS OF SUPERVISIONS

Mandatory Conditions:

1) The defendant shall not commit another federal, state, or local crime.

2) The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

3) In supervised release cases only, the defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

4) If convicted of a felony, the defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

5) The defendant shall cooperate in the collection of DNA as directed by the probation officer if the

collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 1413a).

6) If convicted of a sexual offense as described in 18 U.S.C. § 4042(c)(4), the defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer.

7) If convicted of a domestic violence crime as defined in 18 U.S.C. § 3561(b), the defendant shall participate in an approved program for domestic violence.

8) If the judgment imposes a fine or restitution, it is a condition of supervision that the defendant pay in accordance with the Schedule of Payments sheet of the judgment.

Standard Conditions:

1) The defendant shall not leave the judicial district without permission of the court or probation officer.

2) The defendant shall report to the Probation Officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the Probation Officer and follow the instructions of the Probation Officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation, unless excused by the Probation Officer for schooling, training or other acceptable reasons.

6) The defendant shall notify the Probation Officer at least ten days prior to any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substance, except as prescribed by a physician.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the Probation Officer.

10) The defendant shall permit a Probation Officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the Probation Officer.

11) The defendant shall notify the Probation Officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or special agent of a law enforcement agency without the permission of the Court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

14) If convicted of a sexual offense as described in 18 U.S.C. § 4042(c)(4), or has a prior conviction of a State or local offense that would have been an offense as described in 18 U.S.C. § 4042(c)(4) if a circumstance giving rise to Federal jurisdiction had existed, the defendant shall participate in a sex offender treatment program approved by the probation officer. The defendant shall abide by all program rules, requirements and conditions of the sex offender treatment program, including submission to polygraph testing, to determine if the defendant is in compliance with the conditions of release. The defendant may be required to contribute to the cost of the services rendered (copayment) in an amount to be determined by the probation officer, based on the defendant's ability to pay.

15) The defendant shall submit to an evaluation for substance abuse or dependency treatment as directed by the probation officer, and if deemed necessary by the probation officer, the defendant shall participate in a program approved by the probation officer for treatment of narcotic addiction or drug or alcohol dependency which may include testing and examination to determine if the defendant has reverted to the use of drugs or alcohol. The defendant may be required to contribute to

the cost of the services rendered (copayment) in an amount to be determined by the probation officer, based upon the defendant's ability to pay.

16) The defendant shall submit to an evaluation for mental health counseling as directed by the probation officer, and if deemed necessary by the probation officer, the defendant shall participate in a mental health program approved by the probation officer. The defendant may be required to contribute to the cost of the services rendered (copayment) in an amount to be determined by the probation officer, based upon the defendant's ability to pay.

17) If the defendant is excluded, deported, or removed upon release from imprisonment, the term of supervised release shall be a non-reporting term of supervised release. The defendant shall not illegally re-enter the United States. If the defendant lawfully re-enters the United States during the term of supervised release, the defendant shall immediately report in person to the nearest U.S. Probation Office.

18) If the judgment imposes other criminal monetary penalties, it is a condition of supervision that the defendant pay such penalties in accordance with the Schedule of Payments sheet of the judgment.

19) If the judgment imposes a fine, special assessment, restitution, or other criminal monetary penalties, it is a condition of supervision that the defendant shall provide the probation officer access to any requested financial information.

20) If the judgment imposes a fine, special assessment, restitution, or other criminal monetary penalties, it is a condition of supervision that the defendant shall not incur any new credit charges or open additional lines of credit without the approval of the probation officer unless the defendant is in compliance with the payment schedule.

The Court further adopts such of the following special conditions applied to the supervised person by the judge at the time of sentencing:

1) **COMMUNITY CONFINEMENT:** The defendant shall reside in a Community Corrections Center for a period of ___ months to commence on _____. Further, once employed, the defendant shall pay 25% of his/her weekly gross income for his/her subsistence as long as that amount does not exceed the daily contract rate.

2) **HOME DETENTION:** The defendant shall participate in the Home Confinement Program for a period of ___ days/months. During this time the defendant shall remain at his/her place of residence except for employment and other activities approved in advance by the probation officer. The defendant shall maintain a telephone at his/her place of residence without "call forwarding," a "modem," "caller ID," "call waiting," or portable cordless telephones for the above period. At the direction of the probation officer, the defendant shall wear an electronic monitoring device and follow electronic monitoring procedures specified by the probation officer. The court further orders that the defendant shall pay for

the costs of Home Confinement, as directed by the probation officer.

3) **COMMUNITY SERVICE:** The defendant shall perform ___ hours of community service work without pay, at a location approved by the probation officer, at a minimum rate of four hours per week, to be completed during the first ___ months of supervision.

CRIMINAL MONETARY PENALTIES/SCHEDULE

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth. Unless the Court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. Criminal Monetary Penalties, except those payments made through Federal Bureau of Prisons' Inmate Financial Responsibility Program shall be paid through the Clerk, United States District Court, 800 Franklin Avenue, Room 380 Waco, Texas 76701.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

	Assessment	Fine	Restitution
TOTAL:	$200.00	$5,000.00	$0

Special Assessment

It is ordered that the defendant shall pay to the United States a special assessment of $200.00. Payment of this sum shall begin immediately.

Fine

The defendant shall pay a fine of $5,000.00 as to Count TWENTY-THREE (23). Payment of this sum shall begin immediately. This fine includes costs of incarceration and/or supervision. The Court finds the defendant has present and future ability to pay a reduced fine.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column above. However, pursuant to 18 U.S.C. § 3664(i), all non-federal victims must be paid before the United States is paid.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. §3614.

The defendant shall pay interest on any fine or restitution of more than $2,500.00, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. §3612(f). All payment options may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. §3612(g).

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-50459

UNITED STATES OF AMERICA

Plaintiff – Appellee

v.

JOHN KENNETH COIL

Defendant – Appellant

Appeal for the United States District Court
for the Western District of Texas, Waco

ON PETITION FOR REHEARING

(Filed Jul. 1, 2008)

Before KING, DAVIS, and CLEMENT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is /s/ denied .

ENTERED FOR THE COURT:

/s/ [illegible]
United States Circuit Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

UNITED STATES OF AMERICA	)	WA-03-CR-197
VS.	)	AUSTIN, TEXAS MARCH 27, 2007
JOHN KENNETH COIL	)	(Filed Aug. 2, 2007)

TRANSCRIPT OF RESENTENCING
BEFORE THE HONORABLE
HARRY LEE HUDSPETH
UNITED STATES DISTRICT JUDGE

ORIGINAL

Proceedings reported by stenotype, transcript produced by Computer-aided transcription.

APPEARANCES

FOR THE PLAINTIFF:

FOR THE PLAINTIFF:
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FOR THE DEFENDANT:
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OFFICIAL U.S. COURT REPORTER:
MS. JULIE A. GOODWIN, CSR
United States District Court
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903 San Jacinto Blvd.
Suite 348
Austin, Texas 78701
512.689.7587

ALSO PRESENT:
MS. DEBORAH LOOMIS
MR. MICHAEL GROSS

[3] (MARCH 27, 2007, 11:02 A.M., OPEN COURT.)

THE COURT: You may call the case, please.

COURTROOM DEPUTY: The Court calls W-03-CR-197, United States of America versus John Kenneth Coil for resentencing.

MR. MARSHALL: Mark Marshall for the United States.

MR. FAHLE: John Fahle, Your Honor, on behalf of John K. Coil. And also sitting at counsel table is Michael Gross from – from Denver. And I would ask the Court's permission for him to appear

pro hac vice, I don't think he's going to actually come to the podium, just to sit at the counsel table.

THE COURT: All right. That's fine.

MS. LOOMIS: Your Honor, I'm Deborah Loomis representing Comal County, and we sent the Court an advisory that Comal County officials wanted to appear today. I would just like to say a few words.

THE COURT: Well, you have a bone to pick with him, as I understand it.

MS. LOOMIS: That's right, Your Honor.

THE COURT: Well, we'll get to that later.

Mr. Fahle, you had some objections that you wanted to discuss.

MR. FAHLE: Yes, Your Honor.

Judge, the first objection, the probation officer says that John Kenneth Coil is considered to be the leader – organizer or leader of this conspiracy. I think there's – [4] there's a couple of problems with this. One, Mr. Coil was not convicted of any conspiracy and didn't plead –

THE COURT: That's correct. That would – that's inartfully worded. He can still be an organizer, leader, manager, et cetera of an organization without there being a conspiracy, of course.

MR. FAHLE: I believe that's right, Judge. Although, again, I – I think, and – and we raised in

here that I believe that the remedial opinion on *Booker* is simply wrong, and I think that under *Blakely* that I don't think that the Court can take into account allegations that were neither pled nor proved and – and which were not admitted by the defendant. I think – I think that the only – the only people that can do that under *Apprendi* under *Blakely* would be a jury.

And – and so, again, I raise – I raise that in the written objections, although I don't –

THE COURT: I notice that. You disagreed with the Supreme Court's opinions in *Booker* and *Fanfan* in that regard?

MR. FAHLE: Yes, Your Honor. And –

THE COURT: As much as I'd like to sometimes, I can't overrule them.

MR. FAHLE: I – I understand, Judge. Nevertheless, I have to preserve it for appeal.

THE COURT: Yes, sir.

MR. FAHLE: So that's our – our first objection. [5] Would that – I guess that – that's our first objection, Judge.

THE COURT: Yes, sir. Well, I want – I want to hear all of them. Go ahead.

MR. FAHLE: Oh, okay.

The second objection is the – oh, as to the role of – of the defendant's relevant conduct, all of the relevant conduct, again under – under – I think under *Blakely,* the Court cannot take it into account unless there's been a finding beyond a reasonable doubt or an admission by the defendant, and that hasn't been done.

Paragraph 75, the factual basis indicates that the obscene material displays masochistic behavior and personal to 2 through – 2G3.1(b)(2), a four-level increase is warranted.

Judge, this – that's simply not the case. If we look at the – at the factual basis, even the part that the probation officer cites in her addendum, she says – she says that Paragraph 3 is where that comes from. Paragraph 3 talks about some of the materials, but not necessarily the obscene materials that are – that are being sold – that were sold in some of these stores. And what the – what the guidelines say is, if the obscene materials, the material that you actually pled guilty to or were convicted of as obscene, if that contains masochistic behavior then you get four more points. Here there's no – there is no allegation that any of these [6] videos contained any masochistic behavior – sorry – any masochistic behavior or representations on maso – masochistic behavior.

On Page 3 in Paragraph 6 of the factual basis, that's where the – the videos – the specific videos are listed that – that – that are obscene and that – well,

actually, in fact the only video that Mr. Coil admitted was obscene was Nympho Bride, the first video.

THE COURT: That's correct.

MR. FAHLE: And that simply doesn't have any – any masochistic behavior, so I don't think those were –

THE COURT: Well, I think we discussed that the last time around and perhaps agreed that that was borderline at best. But not knowing at that time that the Supreme Court was going to – to come along and explain to us that the guidelines were not mandatory after all, we kind of brushed it aside because we felt it was academic.

MR. FAHLE: Yes, Your Honor.

THE COURT: That's – that's my conclusion from rereading the transcript of the sentencing hearing. That that's – that it – for the record I overruled your objection at that time, but that followed a rather lengthy discussion as to whether it made any difference.

MR. FAHLE: Yes, Your Honor.

THE COURT: But now it's back up before us again [7] because we're talking now about reasonableness and some other concepts.

All right. Go ahead.

MR. FAHLE: All right. Your Honor, on Paragraph 77, again states that – that the defendant

is considered to be the leader or organizer of the criminal enterprise which involved five or more participants, otherwise extensive. Again, this is not alleged in the face of the indictment. It has not been admitted and has not been found by a jury. I don't think the Court can take that into account under *Blakely*.

Same with Paragraph 82. That states that the mail fraud offense involved more than minimal planning as false documents and tax returns were subscribed over a period of time, and therefore adds two levels for that.

Again, it's not in the face of the indictment. It's not been proved beyond a reasonable doubt. It has not been admitted. And the – you know, this was the mailing of a single, false tax return is what Mr. Coil pled to.

Paragraph 83 adds two levels. I think first off that's double counting because it add two levels for the offense involving sophisticated means. And I think when you – sorry. When you compare that to the more than minimal planning under Paragraph 82, I think that just is double counting. The other problem is that this is again the subject of finding that was not proved or pled.

[8] Paragraphs 93 and 94 allege criminal convictions from '74 to 70 – 1974 to 1976. And neither of these I think should be counted, judge, because they were punished by less than 60 days in jail, and both were more than ten years prior to the offense here.

What the – what the probation officer has done, it says, Well, but the – but the agents tell us that this conduct – conduct was ongoing for – for a long period of time. Well. Possible –

THE COURT: But they started doing crooked stuff in 1981, was there?

MR. FAHLE: Exactly. Maybe, you know – even if – even if you can still – even if you consider that relevant conduct, the – the guidelines don't permit for purposes of determining – for purposes of determining criminal history category, the guidelines do not permit you to take the date from – from the date of the relevant conduct and go back 10 years. It's from the date of the offense that was pled to, and this was an offense with a specific date.

So therefore we – we believe that the – that those should not be counted and his criminal history category should – should be I instead of a category II.

THE COURT: By your theory, he would have only one criminal history point, which if you have zero or one you're in criminal history category I.

[9] MR. FAHLE: That's correct.

THE COURT: That's your argument.

MR. FAHLE: Judge, the next thing that I've phrased here is that – is that under – under *Booker* I think that it's very clear that the Court can simply apply a reasonable sentence. And for several reasons I believe that – that the guidelines in this

case will be unreasonable. That – that, you know, even if you take into account all of the things the probation officer asks you to take into account, that that – that it becomes an unreasonable sentence.

THE COURT: Why do you say that?

MR. FAHLE: Well, for several reasons, Judge. First, Mr. Marshall - Mr. Marshall recalls this differently, but I will represent to the Court the way I recall this happening was that Mr. Marshall and I specifically went through the guidelines. We did not have a binding plea agreement as – as to the amount of time. Nevertheless, we went through the guidelines and discussed what we thought the guidelines would come out to.

And – I mean, I – I specifically remember having this conversation. I have an independent recollection of it, Judge. And what we both concluded was that the guidelines would come out to somewhere around 41 months, and that that would – that if he got – if Mr. Coil got the bottom of the guidelines, that he would then do approximately three years of [10] actual time.

That – that was what we discussed we thought the guidelines were going to be. That doesn't bind this Court in any way because we did not put that in the plea agreement. And Mr. Marshall in fact didn't want to put that in the plea agreement, but that was, you know, an 11C 1 C, I think it is.

THE COURT: Well, there are a couple of comments about sentence in the plea agreement.

MR. FAHLE: Yes, Your Honor.

THE COURT: At least a couple. One if I recall – and I have a plea agreement here, but I haven't looked at every page this morning – one of those was that they would recommend a sentence toward the lower end of the guideline. Isn't that in there?

MR. FAHLE: Yes. I believe it is, Your Honor.

THE COURT: And then another, which we'll come to in a few minutes after you finish your complete comments, is that there's a possibility of a 5K motion.

MR. FAHLE: That's correct, Your Honor.

THE COURT: All right. So those are the only two things I recall that in the plea agreement itself in writing that apply to what the sentence might be.

MR. FAHLE: Absolutely, Your Honor. And – and there again that's why – that's why I'm not here arguing this as a – as a contract issue because I don't think that – that the [11] Government is contractually bound to – to any particular sentence. However, I do believe that – that out of sort of the fundamental fairness and the reasonableness of the sentence, the Court can take that into account under *Booker* and impose a lower sentence.

The other – the other thing, Judge –

THE COURT: What causes you to say that a sentence of – what did you say? – about three years, that that would be reasonable. How do we arrive at that?

MR. FAHLE: Well, Judge, again because I think that that was – that was what was contemplated, not negotiated by the parties but contemplated by the parties when we entered into this.

And the – the other reason is there was – this – this whole investigation started through an investigation of Goalie Entertainment and Eddie Wedelstedt. And Mr. Wedelstedt, since this Court last sentenced Mr. Coil, ended up pleading, and it was – that case was related to this case because Mr. Wedelstedt's company, Goalie Entertainment, serviced the – the peep show machines in the – involved in this case in a lot of the stores.

And so in any event, Mr. Wedelstedt was charged, I believe, with – I believe it was 21 counts. He ended up pleading, and it was the same sort of thing. It was tax evasion and – and obscenity. He ended up pleading to client [12] conspiracy and obscenity and was given a – a sentence of 13 months out of the Northern District of Texas.

So again, sort of in the interest of parody in the sentencing, which is one of the things – one of the goals of the guidelines, one of the things that Congress was interested in having – again, I'm not going to ask this Court to go for – to go down to 13 months simply because I think that – that Mr. Coil is also

bound – or not bound, but – but that – well, what he contemplated when he signed this agreement. And what I contemplated and what Mr. Marshall was contemplating was that he would do approximately three years.

And so I'm – I'm – I'm not going to ask the Court to go down that far, but I am going to ask the Court to take into consideration that Mr. Wedelstedt was sentenced at such a low level.

Paragraph 145, Judge – and I think we discussed this last time also – alleges that Mr. Coil has previously been charged in at least nine criminal cases which involved obscenity or some type of violence where he was able to escape conviction. And had conviction resulted in those circumstances, his criminal history category would undoubtedly be higher than a category II, and that the probation officer states, this is a fact which may warrant departure.

I – I don't think that – that it should, Judge. I mean, there's a – particularly in an obscenity case where [13] every – every expressive material is presumed not to be obscene. It's presumed to be protected by the first amendment.

Where there's never a judicial finding of obscenity, I – I don't think that you can say, Well, there should have been, you know. So I – I – I would ask that the Court not take any of those previous allegations into account.

THE COURT: Well, I think I made it clear last time that charges not resulting in convictions would not be considered.

MR. FAHLE: Thank you, Judge.

That's the . . .

THE COURT: Those are your objections?

MR. FAHLE: Those are our objections.

THE COURT: All right. Let's see if there's any response to those objections.

MR. MARSHALL: Taking those in order, Your Honor, with regard to leader or organizer, *Booker*, *Fanfan* and its progenies simply do not say what counsel argues. He's arguing something the Supreme Court has not indicated is the law. The Court is entitled to look at the conduct contained both in the factual basis and then found in the Presentence Investigation Report. And the Court can certainly look at the other defendants that have been involved in this particular case, their roles in the prospective offenses and what they said and didn't say about what was going on.

* * *

[29] because one of the preliminary judges of forfeiture I believe did say – and there were many of them – but one of them did say something about for him forfeiting all his stock and ownership interest in the corporations, and that simply wasn't the deal.

THE COURT: Well, all right. Maybe I misunderstood Comal County's concern because this court's not involved in their lawsuit.

MR. FAHLE: Absolutely, Judge.

THE COURT: I thought their – their concern was that since Mr. Marshall now owns the land on which this is happening that he had assumed the role of a king of porn and they didn't like that.

MR. FAHLE: And actually, Judge, I don't think that this particular store was forfeited, the – the store that Comal County is talking about, if I remember right. I don't think there was a quitclaim on that or that it was forfeited.

THE COURT: Well, I'm not sure to what extent I have any interest in that, frankly. That's between some other parties.

MR. FAHLE: Thank you, Judge.

THE COURT: All right. Well, bring your client up here so we can rule on the objections and proceed.

Mr. Fahle, all of the objections that you've interposed today, most of which are a restatement of objections previously made, but whether they were or not, your objections [30] are overruled with the exception of one and that is your objection that's directed to what is designated as Paragraph 75 about whether the obscene material in question, which I agree with you refers to only one particular video, the Nympho

Bride, whether that displays masochistic behavior or not. That appears to me to be within the category of things that the Supreme Court meant when he – when they told us and explained to us that certain types of enhancements had to either be agreed to in connection with the guilty plea or proved to the satisfaction of a jury.

I think it's borderline, but I'm going to give you the benefit of the doubt on that or your client the benefit of the doubt and say that that is one such category of enhancements so that instead of a four-level upward adjustment, that should be neutralized to a zero, for whatever difference that makes, because we – we talked the first time around about whether or not it was academic, and it may well be academic.

As far as the other objections to calculations such as more than minimal planning, such as a sophisticated means, such as occupying a position of leadership over other individuals in connection with the organization, those strike me as having been traditional considerations that have always been applied by sentencing courts with or without guidelines before, during, and after. And that it is more than appropriate to apply them to any process of arriving at a [31] reasonable sentence in this case.

So your objections to those items are overruled.

Also with respect to the criminal history category and whether those 1970s era convictions can be considered by the Court in calculating criminal history, that point is arguable, but I'm going to

overrule your objection and rule that they may be considered and that the criminal history category is II rather than I.

So that will lead us to a final guideline calculation. And keep in mind, as I'm sure you do, that the ultimate test these days is reasonableness, and that the Court is called upon to impose a sentence that is reasonable as the Supreme Court has suggested to us that term is to be interpreted.

So what would you like to say for your client with respect to the sentence to be imposed by the Court?

MR. FAHLE: Your Honor, I believe Mr. Coil wanted to speak briefly.

THE COURT: He certainly has that opportunity.

Go ahead, Mr. Coil.

THE DEFENDANT: Thank you, Your Honor.

There's been some mention about me testifying about Mr. Wedelstedt and what went on with him.

Mr. Wedelstedt's organization was inherited from another group, people back in the northeast. Before

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[35] relative culpability of the defendants in this particular case rather than some case in another district with which I'm not really familiar.

MR. MARSHALL: In this case, if you look at the other co-defendants, the man used his family, and we cut a lot of those people some slack and didn't make them take time and take hits. Mr. Castro did. He went to jail and some other people went to –

THE COURT: And Mr. Phelps.

MR. MARSHALL: Mr. Phelps is in jail.

THE COURT: That's right.

MR. MARSHALL: But when you look at all those sentences, this man was clearly in charge, and he deserves the guideline range.

THE COURT: I understand your position.

Anything further?

MR. FAHLE: No, Judge.

THE COURT: All right. Mr. Coil, I've sustained one objection along the way, although in practical effect it may not have much practical effect. But that had to do with count nine which was the charge of transporting obscene matters.

The objection that I sustained which changed the offense level downward by four levels caused it to end up with the total offense level of 17 rather than the previous number. And with respect to count 23, that's the one that brings us to [36] a higher guideline range because the total offense level in count 23 is 25. I've also determined that the criminal history

category that is proper to apply in this case is a category II.

So, starting with count 23, we have a total offense level of 25 and a criminal history category of II, keeping in mind, of course, that we have a statutory maximum that happens to be below the guidelines. The guideline range is 63 to 78 months of custody, two to three years of supervised release, and a fine range of $10,000 up to $100,000.

The Court finds that a sentence of 60 months, which is also the statutory maximum, would be reasonable under all the circumstances. And therefore, with respect to count 23, the sentence imposed is 60 months in the custody of the Bureau of Prisons, to be followed by three years of supervised release, a fine of $5,000. That was also imposed in the original judgment.

With respect to count nine, this will be a concurrent sentence. The Court will impose a concurrent sentence of 33 months in the custody of the Bureau of Prisons to be followed by three years of supervised release and no additional fine.

Those two sentences of imprisonment and those two terms of supervised release are to run concurrently with each other.

Now, does your client desire to take advantage of a [37] voluntary surrender?

MR. FAHLE: Yes, Your Honor.

THE COURT: And in that connection, we talked at the last sentencing hearing about some health problems. That was three years ago. What's the situation now?

MR. FAHLE: Your Honor, I – actually, I haven't conferred with my client on that.

THE COURT: Well, let's find out.

THE DEFENDANT: I have the same health problems that I had earlier. I don't even remember the names of them. It's affected my memory too.

THE COURT: We talked about Meniere's disease which was a condition of the inner ear, and you told us in some detail what doctors had done to try to alleviate this condition. And in fact in the previous judgment that was entered from which you took your appeal, I recommended a medical center as the place of commitment.

Do you recall that, Mr. Fahle?

MR. FAHLE: Yes, Your Honor.

THE COURT: Is that still what your client would like to request?

THE DEFENDANT: Yes.

MR. FAHLE: Yes, Your Honor.

THE COURT: • All right. Now getting back to the question of whether you want voluntary surrender, did you say

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